No. 17-1705

In The
Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF OKLAHOMA, INDIANA, LOUISIANA, NEBRASKA, TEXAS, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act.

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INTERESTS OF AMICI CURIAE

Amici curiae are the States of Oklahoma, Indiana, Louisiana, Nebraska, Texas, and West Virginia. Amici have a sovereign interest in preserving the separation of powers and the constitutional rights of their citizens, both of which are implicated by this case. Amici States have an especial interest in this case because the decision below, if affirmed, would deprive State courts of their independent and coordinate ability to interpret federal law in private suits brought under the Telephone Consumer Protection Act ("TCPA"). *See Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). The Act specifically permits private litigants to bring suit under the TCPA in state courts, 47 U.S.C. §§ 227(b)(3) & 227(c)(5), which "have concurrent jurisdiction over private suits under the TCPA." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012). "[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation." *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring). *A fortiori*, a state court cannot be bound by a federal agency's interpretation of a federal statute—especially where the federal statute is unambiguous and the agency's interpretation is unreasonable. The decision below threatens to upend that important prerogative of state courts. For similar reasons, the decision below also affects enforcement actions brought by State Attorneys General as authorized by the TCPA. 47 U.S.C. §§ 227(e)(6), 227(g).

Finally, the States' interests also extend to the many other contexts to which the Hobbs Act applies. By its own terms, the Hobbs Act's jurisdiction-channeling provision also applies to final orders issued by the Atomic Energy Commission, Department of Agriculture, Federal Maritime Commission, Department of Transportation, and Surface Transportation Board—as well as final orders under Section 812 of the Fair Housing Act, 42 U.S.C. § 3604, which prohibits discrimination in the sale or rental of housing. *See* 28 U.S.C. § 2342(2)-(7). Amici States have a role to play in all of these regulatory contexts, *see, e.g.*, 42 U.S.C. § 3604(5), and often find themselves disagreeing with federal agencies. The States are also frequently involved in litigation conducted pursuant to analogous provisions that preclude judicial review of agency action, such as the Clean Water Act. *See, e.g.*, 33 U.S.C. § 1369(b)(1); *Nat'l Ass'n. of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018); Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1810 (2018).

SUMMARY OF ARGUMENT

The Court below raised serious constitutional concerns relating to the separation of powers, due process, the First Amendment, and federalism when it held that the Hobbs Act, 28 U.S.C. §§ 2341 *et seq.*, required the district court to adopt the Federal Communication Commission's ("FCC") interpretation of the TCPA—regardless of its validity under the laws and Constitution of the United States. Pet. App. 18a. Although this Court has previously held that courts should defer to an agency's reasonable interpretation of an ambiguous statute, *Chevron U.S.A. Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837 (1984), this Court has never countenanced an argument that any Article III tribunal is statutorily *bound* by an agency's interpretation of a statute, *even if the interpretation is unambiguously unlawful.*

Yet that is what Respondent argues and what the court below held. In so doing, the Fourth Circuit has created a Hobson's choice: either monitor the Federal Register and challenge every guidance document within 60 days of promulgation, or forever waive any statutory or constitutional defense to private suits. *See* 28 U.S.C. § 2344 (providing 60 day requirement). The better reading of the Hobbs Act is that U.S. Courts of Appeals have exclusive jurisdiction over direct challenges to final orders that have the force of law, but defendants in private suits always retain the ability to raise constitutional or statutory defenses—even if they conflict with how federal agencies have interpreted the relevant statutes. Any other interpretation of the Hobbs Act would raise serious constitutional problems and so should be avoided.

ARGUMENT

I. The Hobbs Act Does Not Prevent State And Federal District Courts From Independently Interpreting Federal Statutes.

This case began like any other case an Article III tribunal hears. Plaintiff filed a private suit against defendants based on a federal cause of action under the TCPA. *See, e.g.*, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016). The defendants argued that they did not violate the statute, because their conduct did not fall within the definition of "unsolicited advertisement" as used in the TCPA. 47 U.S.C. § 227(b)(1)(C). The Act itself defines the term, and so do many dictionaries. 47 U.S.C. § 227(a)(5) (defining phrase as "material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise"). It is hardly surprising, then, that in these cases Article III courts have conducted a straightforward interpretation of the statute: looking to the text of the statute, reviewing its definition, consulting various dictionaries, contemplating its ordinary meaning, as well as considering the FCC's own interpretation. *See, e.g.*, *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 221 (6th Cir. 2015); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257 (11th Cir. 2014); Pet. App. 24a-29a, 36a-43a. This is, after all, the bread and butter of the judicial process. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[I]nterpreting congressional legislation is a

recurring and accepted task for the federal courts."). It is what courts do.

It is true that the FCC has also weighed in on the proper interpretation of this statutory phrase—as have several scholars. *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006); *see, e.g.*, Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. ILL. J.L. TECH. & POL'Y 313, 328-330. But this Court held that the judiciary is not bound by these interpretations, *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944), and need only defer to the agency when (1) the statute is ambiguous and (2) the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 844.

The court below instead relied upon an idiosyncratic interpretation of the Hobbs Act to divest the district court of its ability to exercise its own judgment in interpreting a federal statute—or to even apply the already-too-deferential *Chevron* standard to the FCC's proffered interpretation. But by its own terms, the text of the Hobbs Act does not divest federal district courts of their constitutional obligation to independently interpret federal statutes for three reasons: (A) the Hobbs Act only applies to direct review of agency final orders; (B) in this case, the FCC's interpretive rule does not have the "force of law" and so is not reviewable; and (C) the lower court's interpretation would produce inefficient results at odds with the statute's purpose.

A. The Hobbs Act Only Applies To Direct Challenges, Because Only Direct Challenges "Determine The Validity Of" Agency Rules.

The Hobbs Act vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain orders. 28 U.S.C. § 2342. As this Court has previously recognized, this requires an aggrieved party to "bring a direct review proceeding to challenge" one of the specified final orders in a U.S. Court of Appeals. *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 613 (1966). After all, the plaintiff in such a suit would be asking the federal court "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" that final order, and the defendant in that suit would be the one and only party responsible for "the entry of [the] final order reviewable under this chapter"—that is, "[t]he action shall be against the United States." 28 U.S.C. § 2344. No one questions that, for example, if a litigant wishes to challenge "the FCC's denial of [its] rulemaking petition," such a suit may only be brought "in the Court of Appeals." *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)); *see also Council Tree Inv'rs, Inc. v. FCC*, 863 F.3d 237, 240 (3d Cir. 2017) (challenging FCC rule substance under arbitrary and capricious review).

But the Hobbs Act does not preclude a district court from interpreting a federal statute in a private action, even if the FCC has issued guidance on its interpretation of that statute. In a private suit, neither

the plaintiff nor the defendant is asking the district court to "determine the validity of" an interpretive rule. Rather, both parties may stipulate that the agency validly took an action expressing its interpretation of a statute—*e.g.*, that the FCC (or other agency) duly complied with all the procedural requirements when promulgating this view. The parties simply disagree with the agency's interpretation of the federal statute as expressed in the document. But no one is asking the court to order "the United States," 28 U.S.C. § 2344, to obey an injunctive directive, 28 U.S.C. § 2342.

This case was not a proceeding to enjoin, set aside, annul, or suspend any order. It is rather a civil suit, brought by a private entity (Carlton & Harris Chiropractic) against another private entity (PDR Network) under a particular statute, the parties disagree about whether the statute applies to the defendant's actions, and the FCC happens to have proffered an interpretation of that statute. It is therefore better characterized as a proceeding to impose civil liability on a regulated entity, consistent with the agency's interpretation of a federal statute. But as Judge Thacker noted in her dissent, "the district court did not actually determine the validity of the 2006 FCC Rule" and so "did not exceed its jurisdiction." Pet. App. 19a.

Indeed, other federal judges have reached the same conclusion. As the Third Circuit recently held, a private suit under the TCPA "does not address the validity of the FCC's orders" and so is outside the Hobbs Act. *Manuel v. NRA Group LLC*, 722 Fed. App'x 141, 144 n.5 (3d Cir. 2018); *cf. Osorio*, 746 F.3d at 1257

("[W]e are not called upon here to assess the order's validity. We are instead simply deciding whether the FCC's . . . ruling is applicable to the present case."). But it is emphatically wrong to say that, "[b]y refusing to enforce the FCC's interpretation, the district court exceeded its power." *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014).

This conclusion is consistent with the daily practice of state courts across the country that assume the validity of other states' legal determinations, yet nevertheless adjudicate whether those determinations provide a basis for the relief requested by private parties. U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *see, e.g.*, *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364, 368 (Va. 1939); *cf. Calderon v. Ashmus*, 523 U.S. 740, 746 (1985) (assuming validity of insurance policy).

B. The Hobbs Act Does Not Apply To Interpretive Rules Because They Do Not Have The Force Of Law.

The Hobbs Act applies to "all final orders of the [FCC] made reviewable by 47 U.S.C. § 402(a)." 28 U.S.C. § 2342(1). Section 402(a), in turn, makes reviewable "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission." But to be reviewable, and thus subject to the Hobbs Act, the FCC's determination must have the "force of law." *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407,

417 (1942). "Generally, administrative orders are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." *Multistar Indus., Inc. v. U.S. Dep't of Transp.*, 707 F.3d 1045, 1052 (9th Cir. 2013) (quoting *Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 862 F.2d 222, 225 (9th Cir. 1988)); *see, e.g.*, *Houston Post Co. v. United States*, 79 F. Supp. 199, 202 (S.D. Tex. 1948) (conducting inquiry into "whether the complained of interpretation of the [FCC] is or is intended to be a mere expression of opinion").

In this case, the FCC's interpretive rule is merely a guidance document. "Interpretive rules do not require notice and comment" and "do not have the force and effect of law." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). As such, they "are not accorded that weight in the adjudicatory process." *Id.* Instead, the interpretive rules are merely "issued by [the] agency to advise the public of the agency's construction of the statutes and rules which it administers." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30, n.3 (1947)); *see also Perez v. Morg. Bankers Assoc.*, 135 S. Ct. 1199, 1203-04 (2015). Although this may be of some use to courts in ascertaining the meaning of ambiguous statutes, this rule does not rise to the level of having the "force of law" and so falls outside the ambit of the Hobbs Act. *See, e.g.*, *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143-44 (1939); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007). The district court in this case therefore

had jurisdiction to interpret the TCPA in the first instance.

C. Any Other Interpretation Produces Inefficient Results, At Odds With The Purpose Of The Hobbs Act.

Everyone agrees that the purpose of the Hobbs Act is to promote efficiency. The provision at issue "'promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency' with overseeing the TCPA." Pet. App. 7a-8a (quoting *Mais*, 768 F.3d at 1119); *accord Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010); *cf. Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 633 (noting efficiency of eliminating district court review). Rather than encouraging litigants to undertake costly review in a district court before an inevitable appeal to a U.S. Court of Appeals, Congress recognized that it would be more efficient to let these pure questions of law be brought in the appellate courts in the first instance. This all remains true if application of the Hobbs Act's preclusive review provision remains limited to direct challenges of legally binding rules. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. at 468; *Neustar, Inc. v. FCC*, 857 F.3d 886, 891 (D.C. Cir. 2017).

But the same logic does not extend to suits brought by private parties to enforce the TCPA against other private parties. Under the Fourth Circuit's reading, private businesses should monitor the Federal Register for every new interpretive rule, challenge such rules at the time they are being considered (so as to have standing for a subsequent challenge in federal court), then challenge them in a U.S. Court of Appeals within 60 days—or forever waive any legal defense in a subsequent private action. This would require firms to undertake significant compliance operations. It would force businesses to guess well in advance whether a new rule could ever be applied to their future conduct. All of this would produce massive inefficiencies at odds with the purpose of the Hobbs Act. And as Justice Powell points out, it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

For all these reasons, this Court should not read the Hobbs Act as abrogating the power of district courts to entertain constitutional and statutory defenses in private suits brought under the TCPA.

II. Constitutional Avoidance Counsels Against Respondent's Preferred Reading Of The Hobbs Act.

The court below held that "The Hobbs Act requires a district court to follow FCC interpretations of the TCPA." Pet. App. 18a. This holding raises serious constitutional concerns: (A) it violates the separation of powers and undermines federalism by depriving federal district courts and state courts of their obligation to "say what the law is"; (B) it violates due process by depriving regulated entities of any meaningful opportunity to contest an agency's interpretation of law; and (C) it leads to absurd consequences where regulated entities may be foreclosed from raising constitutional defenses to private actions.

But this Court has consistently held that "[w]hen a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem." *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 74 (1868) ("A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it.").

Here, the statute is susceptible to an interpretation that does not raise any constitutional issues. *Supra* Part I.

A. Reading the Hobbs Act As A Jurisdiction-Stripping Statute Would Violate Separation Of Powers And Undermine Federalism.

At this point, the serious constitutional problems raised by rules that require courts to abdicate their role of independently interpreting the law are well-recognized. They have been pointed out by members of this Court.[1] Judges of lower courts have repeatedly

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[1] *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring) ("The type of reflexive deference exhibited in some of these cases is troubling. . . . [I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("I write separately to note that [the agency's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."); *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring) ("I write separately because these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations . . . [b]ecause th[ese] doctrine[s] . . . rais[e] constitutional concerns."); *Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129

complained of them.[2] "Scholarly voices have joined the skeptical chorus as well." Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1079 (2016).[3] Nonetheless, this Court has postponed the question of "whether *Chevron* should remain" good law. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

But if *Chevron* deference is bad, *PDR* deference is worse. Here, the court below held that "The Hobbs Act

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HARV. L. REV. 2118, 2150-54 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (discussing practical difficulty of ascertaining when a statute is "ambiguous"); *see also E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563 (2018) (statement of Gorsuch, J., respecting the denial of certiorari); *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., dissenting from denial of certiorari); *Scenic Am. Inc. v. U.S. Dep't of Transp.*, 138 S. Ct. 2 (2017) (statement of Gorsuch, J., respecting the denial of certiorari).

[2] *See, e.g.*, *Arangure v. Whitaker*, No. 18-3076, 2018 WL 6614239, at *2 (6th Cir. Dec. 18, 2018); *S.E.R.L. v. Atty. Gen. U.S. of Am.*, 894 F.3d 535, 554 (3d Cir. 2018); *Voices for Int'l Bus. & Educ., Inc. v. N.L.R.B.*, 905 F.3d 770, 780 (5th Cir. 2018); *Chamber of Com. of U.S. of Am. v. U.S. Dep't of Labor*, 885 F.3d 360, 380 n.14 (5th Cir. 2018); *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 637 (9th Cir. 2018) (Ikuta, J., dissenting); *Our Country Home Enters., Inc. v. Comm'r of Internal Revenue*, 855 F.3d 773, 790 (7th Cir. 2017); *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 280 (3d Cir. 2017) (Jordan, J., concurring); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-32 (6th Cir. 2016), *rev'd on other grounds*, 137 S. Ct. 1562 (2017) (Sutton, J., concurring in part and dissenting in part); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 48 (Wis. 2018).

[3] *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing "yes"); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 1000 (2017) (concluding that *Chevron* "is an innovation" that "cannot be squared with the text of section 706 of the APA").

requires a district court to follow FCC interpretations of the TCPA," Pet. App. 18a, *even if the statute is not ambiguous*, and *even if the agency's interpretation is unreasonable*. Such a rule would combine the legislative, executive, and judicial powers in one set of hands—"the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (J. Madison). It would represent the *ne plus ultra* of judicial deference to the administrative state. Even in the context of national security, this Court has "reaffirm[ed] that it is the province and duty of this Court 'to say what the law is.'" *United States v. Nixon*, 418 U.S. 683, 705 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). And in this particular case, both the district court and other courts have found the statute to be "unambiguous" and contrary to the FCC's preferred interpretation. Pet. App. 39a, 42a; *Sandusky*, 788 F.3d at 223. Nor is this an isolated occurrence; the FCC's interpretations are frequently "difficult to follow." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017) (Kavanaugh, J.). The decision below therefore threatens to undermine the separation of powers.

The most natural reading of this statute is that Congress intended to command litigants bringing *direct* challenges to new FCC rules to file them in the U.S. Courts of Appeals—for the sake of judicial economy. Nothing in the text, history, or purpose of the

statute indicates that Congress intended to deprive Article III tribunals from interpreting laws before applying them to particular cases. As this Court spelled out in *Marbury v. Madison*, "Those who apply the rule to particular cases, *must of necessity expound and interpret that rule*." 5 U.S. (1 Cranch) at 178 (emphasis added). "When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against." *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring) (citing THE FEDERALIST NO. 47 (J. Madison)).

But this case implicates more than just the horizontal separation of powers within the national government. Under the TCPA, enforcement actions may also be brought in *state* courts, 47 U.S.C. §§ 227(b)(3) & 227(c)(5), which "have concurrent jurisdiction over private suits under the TCPA." *Mims*, 565 U.S. at 372. The TCPA also authorizes enforcement actions by State Attorneys General. 47 U.S.C. §§ 227(e)(6), 227(g). If both state courts and state officials must enforce the law as interpreted by a federal agency—no matter how unlawful that interpretation is—serious federalism concerns arise. At a minimum, it forces state courts and officials either to be commandeered into applying the TCPA in a potentially unlawful or unconstitutional manner, or to get out of the business of enforcing the TCPA at all.

The court below also erred in holding that "Congress has specifically stripped jurisdiction from the

district courts regarding a certain issue, those courts lack the power and authority to reach it." Pet. App. 8a. As this Court's decisions have noted, jurisdiction-stripping statutes raise serious separation of powers concerns. *Patchak v. Zinke*, 138 S. Ct. 897 (2018); *id.* at 914 (Roberts, C.J., dissenting); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 n.17 (2016); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *cf. Williams v. Taylor*, 529 U.S. 362, 379 (2000) (stating that "[a] construction of [a statute] that would require the federal courts to cede [interpretive] authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution").

To be sure, this Court has held that Congress may amend the law during the pendency of appeals, provided it does not direct courts to enter judgment in favor of one party or another. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). And Congress may confer or strip a court of jurisdiction over a certain claim—as a whole. But Congress may not both grant jurisdiction to courts (*e.g.*, over private suits for telecommunication violations) and at the same time prohibit courts from entertaining statutory and constitutional defenses to these suits. In other words, Congress cannot grant a court jurisdiction to hear a statutory claim, but then force the same court to blind itself to what the statute actually says and instead look only to an agency's interpretation in enforcing the statute. Inherent in the guarantee of due process is the right to have a federal court interpret and apply a federal statute

before one private party can impose civil liability on another. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995). Just as everyone agrees that "Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins'" because "[s]uch a statute would . . . direct the court how pre-existing law applies to particular circumstances," *Bank Markazi*, 136 S. Ct. at 1323 n.17, neither may Congress direct district courts to apply pre-existing law (here, the TCPA) to particularized circumstances as decided by a federal agency (FCC). This short-circuits the judicial process of determining in the first instance how to apply the pre-existing law to these facts. That is why this Court has always maintained that an agency's views "do not constitute an interpretation of [an a]ct or a standard for judging factual situations *which binds a district court's processes*, as an authoritative pronouncement of a higher court might do." *Skidmore*, 323 U.S. at 139. The Hobbs Act, under Respondent's view, therefore raises novel constitutional questions about the extent to which Congress may enact issue-stripping legislation.

B. The Decision Below Would Deprive Defendants Of Due Process.

This Court has previously warned of "[t]he severity" of any scheme where "persons subject to the Act, including innumerable small businesses" must "protect themselves against arbitrary administrative action only by daily perusal of . . . the Federal Register and by immediate initiation of litigation . . . to protect their interests." *Adamo Wrecking Co.*, 434 U.S. at 283

n.2. It is therefore of no moment to suggest that businesses like PDR could have or should have brought a direct challenge against the FCC's 2006 rule at the time it was promulgated. For one thing, PDR and similar businesses would likely have lacked standing. Pet. Br. 25; *see Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). For another, it would be exorbitantly expensive to monitor the Federal Register, file direct challenges to every new rule, and guess what future business ventures the company might pursue years or even decades down the line—and then file suit within 60 days of the interpretive rule. 28 U.S.C. § 2344. *Cf.* Pet. Br. 40 (characterizing rule as a "severe form of issue preclusion"). What is more, some businesses might not even have existed at the time of the disputed rule, making it legally impossible for them to have ever filed a challenge in time. Such an interpretation would "place in the hands of the" FCC the "unreviewable discretion" to interpret federal law in a manner that would "stri[p] the [defendant] of his constitutional rights and protections." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244 (1960). "This phenomenon raises the spectre of possible unfairness, particularly to small manufacturers who may lack resources to monitor the Administrator's actions to assure protection of the opportunity to contest regulations affecting their interests." *Chrysler Corp. v. EPA*, 600 F.2d 904, 912-13 (D.C. Cir. 1979).

C. The Decision Below Would Strip Defendants Of The Ability To Raise Constitutional And Statutory Defenses.

The absurdity of Respondent's view is best illustrated by considering a corner case. Imagine that a federal agency passes an interpretive rule that on its face discriminates on the basis of race in violation of the Fourteenth Amendment or chills speech in violation of the First Amendment. Imagine further that no regulated entity challenges this interpretive statute in court at the time it is promulgated. *N.L.R.B. Union v. Fed. Labor Relations Auth.*, 834 F.3d 191, 169 (D.C. Cir. 1987) (suggesting similar hypothetical). Does this mean that any defendant sued on the basis of violating the law has forfeited his right to raise a constitutional defense? We think not.

As Justice Powell explained in *Adamo Wrecking Co.*, a regulated entity that fails to challenge an administrative rule within the specified timeframe should not be deprived of later raising a constitutional defense to its application without a court giving the constitutional question "serious consideration." 434 U.S. at 290 (Powell, J., concurring); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) (repeating this concern); *cf. Elgin v. Dep't of Treasury*, 567 U.S. 1, 24 (2012) (Alito, J., dissenting) (raising similar concerns). This follows from the basic rule that "[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws . . . may afford him." *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874). "The

supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

Perhaps mindful of these concerns, at least one federal court of appeals has explicitly recognized that these Constitutional concerns warrant a narrow reading of the Hobbs Act. In *United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658 (6th Cir. 2000), the government initiated an in rem forfeiture action against an unlicensed micro-broadcaster in an attempt to seize equipment knowingly used to broadcast without a license. The defendant argued that the FCC regulation relied upon "was an unconstitutional prior restraint on speech" in violation of the First Amendment. *Any & All*, 204 F.3d at 662, 666-67. The district court held "that it lacked jurisdiction to entertain [the defendant]'s constitutional defenses because 28 U.S.C. § 2342 [*i.e.*, the Hobbs Act] provides that courts of appeals have exclusive jurisdiction 'to enjoin, set aside, suspend . . . or to determine the validity of . . . all final orders of the [FCC].'" *Any & All*, 204 F.3d at 667. The Sixth Circuit reversed, "for the simple reason that no FCC order is being challenged." *Id.* (quoting *United States v. Any & All Radio Station Transmission Equip.*, 169 F.3d 548, 554 (8th Cir. 1999), *opinion rev'd on reh'g*, 207 F.3d 458 (8th Cir. 2000) (Arnold, J., concurring)).

In the words of Judge Arnold, "Until today I had not supposed that anyone could plausibly maintain

that any court of the United States, properly seized of jurisdiction of a suit, did not also have jurisdiction to consider constitutional defenses to that suit." *Any & All*, 169 F.3d at 554 (Arnold, J., concurring), *opinion rev'd on reh'g*, 207 F.3d 458 (8th Cir. 2000). Although the Hobbs Act might govern the jurisdiction for filing "a suit to enjoin a denial of a rulemaking petition[, n]o such petition is at issue here, and the fact that [a defendant] could file one and have his defenses adjudicated is of no moment." *Id.*

But not all lower courts have recognized this principle. *Compare United States v. Neset*, 235 F.3d 415 (8th Cir. 2000) (rejecting argument), *with id.* at 421 (Heaney, J., dissenting) ("I agree with the Sixth circuit's decision . . . that the district courts in this type of case have jurisdiction to hear First Amendment challenges to the F[CC]'s prohibition of microbroadcasting in the context of an enforcement action filed against them."). It is therefore vital that this Court make clear that regulated entities do not forever lose their statutory or constitutional rights by failing to object to agency rules.

This basic constitutional concern is magnified here in the context of the FCC, which regulates speech. Historically, this Court has vigilantly guarded the First Amendment by permitting facial challenges and lenient standing requirements in order to counteract the specter of speech being chilled. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) ("The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges."). Yet

here, the court below went out of its way to deprive the district court of any ability to second-guess the FCC's own interpretation of the TCPA. Pet. App. 2a. This is especially troubling in the context of telecommunications law, as the FCC is uniquely positioned to clamp down on disfavored speech in violation of the First Amendment. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).[4] The speech at issue in this case is hardly "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). To the contrary, Petitioners are offering free copies of a medical text—*Physicians' Desk Reference*—a document of significant social value. *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 478 (2013) (relying upon text).

What is more, federal judges have singled out the TCPA in particular for its "draconian penalties," *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (Posner, J.), which are so disproportionate that scholars have warned lower courts to "take seriously the possibility that the TCPA's statutory damages violate the Due Process Clause of the Fifth Amendment as applied." J. Gregory

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[4] As "the well-known performer Eminem," *Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015), once complained:

> *So the FCC won't let me be,*
> *Or let me be me, so let me see.*
> *They try to shut me down on MTV,*
> *But it feels so empty without me.*

Marshall Mathers, *Without Me*, THE EMINEM SHOW (2002).

Sidak, *Does the Telephone Consumer Protection Act Violate Due Process As Applied?*, 68 FLA. L. REV. 1403, 1412 (2016); *cf. Adamo Wrecking Co.*, 434 U.S. at 283 (emphasizing "[t]he stringency of the penalty imposed"). Private entities have in turn leveraged overbroad agency interpretations to bring *in terrorem* suits against small businesses in their hunt for large settlements. In the words of one court of appeals, "junk-fax litigation is best explained" as having "'blossom[med] into a national cow for plaintiff's attorneys specializing in TCPA disputes'" who use it as a "means of targeting small businesses" to "nai[l] the little guy, while . . . tak[ing] a big cut." *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (quoting Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 97 (2011)).

This Court would never countenance the notion that courts should defer to administrative agencies when interpreting the First or Fourteenth Amendments. It is therefore vital that this Court preserve defendants' ability to raise constitutional and statutory defenses, lest the FCC propagate rules with "obvious chilling effect on free speech." *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 872 (1997); *see, e.g.*, *Am. Lib. Assoc. v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) ("The FCC argues that the Commission has 'discretion' to exercise 'broad authority' over equipment used in connection with radio and wire transmissions, 'when the need arises, even if it has not previously regulated in a

particular area.' This is an extraordinary proposition.") (quoting FCC brief). As this Court recently made clear in the context of the TCPA, "[f]ederal courts, though 'courts of limited jurisdiction,' in the main 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Mims*, 565 U.S. at 376 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

Nor are these concerns limited to the FCC, as the Hobbs Act equally extends to final orders issued by the Atomic Energy Commission, Department of Agriculture, Federal Maritime Commission, Department of Transportation, and Surface Transportation Board—as well as final orders under Section 812 of the Fair Housing Act. *See* 28 U.S.C. § 2342(2)-(7). And other federal statutes contain similar jurisdiction-channeling provisions, including the Clean Air Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). 33 U.S.C. § 1369(b); 42 U.S.C. §§ 7607(b)(2), 9613(a). Amici States frequently litigate claims under these statutes. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 514 (2007); *see also Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 627 (discussing States' challenges to the EPA's Waters of the United States rule). And in those contexts, this Court has consistently held that jurisdiction-channeling provisions do not foreclose all other forms of judicial review.

For example, in *Decker v. N.W. Envtl. Defense Ctr.*, 568 U.S. 597 (2013), this Court held that 33 U.S.C.

§ 1369(b)'s "exclusive jurisdiction mandate . . . extends only to certain suits challenging some agency actions" but "does not bar a district court from entertaining a citizen suit . . . against an alleged violator . . . seek[ing] to enforce an obligation imposed by the Act or its regulations." *Id.* at 608; *cf. N.L.R.B. Union*, 834 F.3d at 196 (noting that because "administrative rules and regulations are capable of continuing application[,] limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule of an opportunity to question its validity") (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)).

Most notably, in *Adamo Wrecking Co.*, this Court held that a defendant "who is charged with a criminal violation under the [Clean Air Act] may defend on the ground that" its conduct did not fall within the statute, even though the agency's implementing regulation was reviewable exclusively in the U.S. Courts of Appeals. 434 U.S. at 279. The Court explained that Congress "ha[d] not uniformly precluded judicial challenge to the order as a defense in [a] criminal proceeding." *Id.* at 282.

> The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar

> inquiries which arise in the course of an administrative review proceeding. The question is only whether [the defendant's conduct falls] within the broad limits of the congressional meaning of that [statute].

Id. at 285.

The Court emphasized that "the Administrator's promulgation of the standard is not subject to judicial review in the criminal proceeding," and "[t]he District Court did not presume to judge the wisdom of the regulation or to consider the adequacy of the procedures which led to its promulgation." *Id.* at 283-84. Instead, the district court "merely concluded that" the alleged conduct did not fall within the statutory definition. *Id.* at 284. As a result, the Clean Air Act's exclusive review provisions "d[id] not relieve the Government of the duty of proving, in a prosecution" that the conduct falls within the relevant statutory definition. *Id.* For the same reasons, the Hobbs Act does not relieve Respondent of its burden to show that Petitioners' conduct falls within the language of the TCPA.

* * *

For all these reasons, Respondent's interpretation of the Hobbs Act raises serious constitutional concerns and should be rejected. The decision below threatens to permit the administrative state to swallow up even more of the liberties guaranteed by the separation of powers, federalism, and due process. Although "the time has" not yet "come to face the behemoth" of judicial deference to federal agencies, *Lynch*, 810 F.3d at

1149 (Gorsuch, J., concurring), at the very least we should stop feeding it.

CONCLUSION

The Court should reverse the decision below.

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